NO. 80-1535

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DOROTHY J. MORGAN, individually and GEORGE J. MORGAN and DOROTHY J. MORGAN, as Administrators of the Estate of THOMAS EDWIN MORGAN, Deceased,

Petitioners,

vs.

GLOBAL COMMUNICATIONS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Should this Court grant the Writ requested by petitioner when the District Court and the Court of Appeals for the Second Circuit, applying the governing Maritime Law, have unanimously found that the awards to the Morgans for the loss of Thomas' society and Mrs. Morgan for mental anguish by being present when her son drowned both items being non-pecuniary in nature, were excluded under the limitations of The Death on the High Seas Act? Does this Court wish to overrule *Mobile Oil* v. *Higginbotham*, 436 U.S. 618, which held that non-pecuniary losses were inapplicable to a Death on the High Seas case?

A further question presented is whether this Court wishes to review a denial of pre-judgment interest where both opinions below denied pre-judgment interest because of the size of the verdict and the fact that the economic loss for the death of Thomas Morgan would have occurred only after the passage of time, if at all.

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Respondent requests this Court decline to grant Certiorari to review an Order of the United States Court of Appeals for the Second Circuit of October 31, 1980, which Order affirmed the Order of the District Court.

Opinions Below

The opinion below of the United States Court of Appeals for the Second Circuit is set forth in Petitioners'

Brief (hereinafter P.Br.) at page 2a. The opinion of the Court was rendered on October 31, 1980. The Court permitted a 30-day withholding of entry of judgment on the remittitur portion of the decision within which time the plaintiffs were given an opportunity to submit a certified copy of the remittitur

The consent to reduce verdict by Dorothy Jean Morgan and George J. Morgan appears in Appendix A to this brief and the consent to reduce verdict of Dorothy Jean Morgan, individually, appears in Appendix B to this brief.

As the Court will note, the decree of the Court below deals with both the Appeal of the defendant which resulted in the remittitur and the Appeal of the plaintiffs which now gives rise to the present application of the plaintiff.

Jurisdiction

It is respectfully submitted that this Court should not exercise jurisdiction over this matter due to the fact that the decision of the United States Court of Appeals for the Second Circuit from which this appeal is taken was rendered on October 31, 1980, and the Petition for Writ of Certiorari was not submitted within the time prescribed in 28 U.S.C. §2101(c), "ninety days after the entry of such judgment or decree." The decree of the Court below dealt with issues other than those set forth within petitioners present application. The remittitur portion of the decree was totally disposed of. The Writ being presented here deals with issues upon which a final decree was rendered on October 31, 1980, more than ninety days after petitioners' Writ was filed.

The decree of the United States Court of Appeals for the Second Circuit (P.Br. at 3a and 4a) clearly spoke upon

the issue presented here in P.Br. The withholding of entry of judgment was only applicable to the portion of the decree reversing the District Court and granting a new trial on the issue of damages. (P.Br. at 5a)

Statement of the Case

Dorothy Jean Morgan and her son, Thomas Morgan, were guests aboard the YACHT LADY MARGARET on a trip from Morehead City, North Carolina, to the Florida waters. The voyage ended in tragedy when the vessel ran into heavy seas and sank well beyond a marine league.

Thomas Morgan suffered from birth from a form of cerebral palsy known as Kernicterus. This relatively uncommon form of the disease has several extremely uniform and homogeneous characteristics. Its victims' ability to use their hands is quite restricted, as is their lip and tongue control. They tend to be deaf and have limited eye mobility. Also, that center of the brain concerned with cerebration usually suffers sufficient damage to affect the learning process.

At age eighteen years and five months, after extensive patterning therapy, Thomas Morgan was evaluated as functioning overall neurologically on the same level as a seven year old. This evaluation represented an average of how he did everything, walking, using his legs, body, arms, feet, eyes, ears, as well as his learning processes. In the opinion of the expert who testified at trial, Thomas's development had reached a plateau.

Despite his disability, Thomas was able to help out around the house. He did chores such as removing the garbage, mowing the lawn, and helping with other tasks such as painting the family house. Thomas also helped his father build a dunebuggy and learned how to drive.

Thomas attended Ossining High School. While in school, he had an IQ of 75 assigned to him. He took only two regents exams in his four years of high school, and failed both of them with grades of 41 and 61. At one time he was in a retarded class.

Dr. Leon Charash, a noted medical expert on cerebral palsy, testified that any career Thomas would have had would have been primarily avocational; that is, designed primarily to benefit him in a therapeutic fashion, rather than to produce income.

The Morgans are financially secure. Mr. Morgan is employed as an engineer for the Stauffer Chemical Company. In 1976, he earned about $42,000.00, and he is vested in a pension plan which will allow him to receive about 40% to 45% of his income. He also owns about 2,000 shares of stock in Stauffer Chemical worth about $30,000.00, and Mrs. Morgan owns a few shares of IBM stock. Additionally, the Morgans own an estate in Ossining consisting of two houses on seven acres of land.

Neither Mrs. Morgan nor her husband anticipate receiving any financial assistance from Thomas during the course of their lives. While Mr. Morgan indicated that if unforeseen circumstances resulted in the necessity of support, he would have expected help from Thomas, he stated, further, "I don't see how I can answer a question like that. I would hope I would never have to receive any financial support from him."

There was little likelihood that Mr. or Mrs. Morgan would, but for Thomas's untimely death, have survived him and become beneficiaries of his estate. Thomas was twenty-seven years old when he died. According to mortality tables his life expectancy was forty-four years. Mrs. Morgan was fifty-six, and her life expectancy was twenty-

four years. Mr. Morgan was sixty and his life expectancy was sixteen years.

At trial, Mrs. Morgan made a series of surprise disclosures concerning mental disability and psychiatric care. Contradicting her responses to interrogatories and her testimony in a deposition given on August 15, 1978, *infra,* she asserted that she had been treated by a psychiatrist for mental problems she had developed since the sinking. She testified that rainy, windy weather now makes her uncomfortable and she is afraid to go swimming. Furthermore, she now suffers from nightmares, Id.

The trial judge submitted two separate series of questions to the jury. The first series of questions related to the liability of Global Communications and three distinct areas of damages. The areas of damage which were awarded by the jurors were three-fold. In the first phase of the jury award, the first award was in the amount of $200,000.00 to Mr. and Mrs. Morgan for pecuniary loss. The second award was in the amount of $50,000.00 to Mr. and Mrs. Morgan based on the pain and suffering of Thomas. The third award was in the amount of $250,000.00 to Mrs. Morgan in her own right for her own personal pain and suffering.

The United States Court of Appeals for the Second Circuit granted a remittitur on the elements of damage so awarded by the jury. (P.Br. 4a and 5a)

The second phase of the trial on damages awarded Mr. and Mrs. Morgan $200,000.00 for the loss of society and affections of their son and awarded $50,000.00 to Mrs. Morgan for her own mental pain and suffering due to her presence during the drowning of her son. The United States Court of Appeals for the Second Circuit affirmed Judge Weinstein in denying this relief. (P.Br. 3a)

The plaintiff, after the verdict had been rendered moved for an award of pre-judgment interest on the pecuniary award. This application was denied by Justice Weinstein and by the United States Court of Appeals for the Second Circuit. (P.Br. 4a)

I

The petitioner has waived her right to seek the Court's Writ of Certiorari by accepting the Second Circuit's Order of a remittitur.

Ever since the Supreme Court decision in the recent case of *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977) it has been settled law that a remittitur, once accepted by a plaintiff, shall not be subject to appeal by that plaintiff. Having accepted, at least in part, the remittitur ordered by the Second Circuit Court of Appeals, petitioners' application for this Court's Writ of Certiorari should be denied, and the Circuit Court's Judgment and Order be affirmed.

The modern usage of the remittitur is succinctly expressed in 6A Moore's Federal Practice, ¶ 59.05[3], at 59-67, wherein it is stated:

> The term "remittitur" is generally used in connection with jury verdicts, and refers to the court's action in diminishing the verdict of the jury. This is usually done on motion of the losing defendant for a new trial on the ground that the verdict is excessive, where, if the trial court considers the ground well taken, it may grant the *plaintiff* an election to remit a stated portion of the amount or submit to a new trial. Remittitur is also used by the appellate courts in both jury and non-jury actions, and, in jury

> actions, mainly where there has been reversible error committed at the trial. . . . The use of remittitur enables the court and the parties to avoid delay and expense of a new trial, and when wisely used furthers the legitimate objective of bringing litigation to as speedy and expeditious end as is reasonable.

As indicated in the foregoing passage, the circuit courts have also utilized the remittitur device, generally in two distinct areas. The first area in which appellate courts so act is where reversible error has been found in the proceedings below, and such error can be reasonably approximated to a definite portion of the verdict amount. See, *Kropp* v. *Ziebarth,* 601 F.2d 1348 (8th Cir. 1979). In the case *sub judice,* the Court of Appeals for the Second Circuit found reversible error in the award of non-pecuniary damages so recently disallowed by the explicit holding in *Mobil Oil Corp.* v. *Higginbotham, supra,* and hence affirmed the trial judge in setting aside that portion of the jury award disallowed by the Supreme Court's recent decision. The remittitur herein is partially based upon the court's appreciation of such error of law made by the jury in its award.

The second general area is similarly closely akin to the action taken by the Second Circuit in the case at bar, in which

> The ruling of the trial judge on a motion for new trial based on excessiveness is subject to restricted review by the court of appeals. Where the ruling is erroneous as a matter of law or is reversible because it is an abuse of discretion the appellate court may itself order a new trial, including a partial new trial limited to damages alone, and may condition its order upon a remittitur. 6A Moore's Federal Practice, ¶ 59.05[3] at 59-67.

Having ruled that the respondent Global Communication was entitled to a new trial on the issue of damages with regard to the awards of $250,000.00 for petitioners' own pain and suffering and $200,000.00 for pecuniary loss under DOHSA, the Court of Appeals for the Second Circuit conditioned its order upon petitioners' filing with the court a certified copy of a remittitur totaling $200,000.00. Failing the petitioners' compliance with the remittitur, a new trial would have been forthcoming.

Petitioners accepted the judgment of the Court of Appeals, filing the remittitur and complying with its terms. However, in seeking the Supreme Court's Writ of Certiorari with respect to the Second Circuit's setting aside of $250,000.00 in non-pecuniary damages which are not countenanced under DOHSA under this Court's recent decision in *Mobil Oil Corp.* v. *Higginbotham, supra,* petitioners are attempting to circumvent the settled law regarding appeals from an accepted remittitur.

It is now settled law that a claimant who accepts and files a remttitur to avoid the granting of a new trial thereby waives his right to seek an appeal from the judgment for the reduced sum. *Donovan* v. *Penn Shipping Co., supra; Koenigsberger* v. *Richmond Silver Mining Co.,* 158 U.S. 41 (1895); *Lewis* v. *Wilson,* 151 U.S. 551 (1894); *Kennon* v. *Gilmer,* 131 U.S. 22 (1889). See also, 9 Moore's Federal Practice, ¶ 203.06, at 3-28.

The non-appealability of a case wherein plaintiff has agreed to a remittitur was most recently addressed and reaffirmed in the case of *Hlodan* v. *Ohio Barge Line, Inc.,* 611 F.2d 71 (5th Cir. 1980), in which the plaintiff sought review of the trial judge's order for a new trial unless the plaintiff agreed to accept a remittitur of $49,000.00 out of the $200,000.00 jury verdict. Plaintiff had decided to accept the remittitur rather than risk a new trial. The court stated:

> The jury in this case returned a verdict of $200,000. The trial court ordered a new trial unless plaintiff accepted a reduction of $49,000 in the verdict. Hlodan accepted the reduced verdict instead of a new trial, 'under protest.' Judgment was entered on his behalf. Plaintiff now attempts to cross appeal, contending the jury verdict should be reinstated. Plaintiff may not, however, appeal from a remittitur order he has accepted. (citations omitted). *Id.*, at 76.

In the case now before the Court, the Second Circuit had ordered a new trial unless petitioners accepted the remittitur. Having accepted the remittitur rather than face the risk of a new jury assessment of damages, petitioners' effort at seeking review of the appellate court's determination should now be denied.

The aim underlying the established policy with regard to the non-appealability of remittiturs is, in essence, judicial economy. *Evans* v. *Calmar S.S. Co.*, 534 F.2d 519 (2nd Cir. 1976). As was true in the instant case, most remittiturs are in fact accepted by plaintiffs, resulting in an end to litigation, payment of a judgment, and elimination of the trouble and expense of a new trial and/or subsequent appeals such as this one. *Id.*, at 522. The Second Circuit ordered a new trial herein, subject only to petitioners' acceptance of a remittitur as an end to the course of this litigation. Upon petitioners' acceptance of the remittitur rather than the vagaries of a new trial, the jurisprudence explicitly holds that the course of the litigation is concluded. A grant of Certiorari under these circumstances would only weaken the salutory effects which have been the result of this Court's decision in *Donovan* v. *Penn Shipping Co., supra,* and would open the floodgates wide to a myriad of similar appeals by parties wishing to gain

the benefits of part of a judicial decision while avoiding those aspects which they find objectionable. To avoid this result, and to retain the benefits enumerated, *supra,* i.e., saving judicial time, energy and expense, the Petition for the Writ of Certiorari should be denied.

II

The decision of the Court below setting aside the award for loss of society represents the appropriate disposition of the instant matter.

In view of *Mobil Oil* v. *Higginbotham, supra,* plaintiff concedes that a proper reading of DOHSA precludes any award for loss of society. P.Br. at 9.

A. DOHSA is controlling in the case at bar since decedent's death was significantly related to a traditional maritime activity.

Petitioners' argument for reinstating the award for loss of society is that, because the location of some of respondent's alleged negligence was on land, DOHSA does not apply and therefore cannot preclude any award for loss of society. (P.Br. at 10) petitioners' argument is untenable. This "locality test" which plaintiff would rely on was recently and explicitly discredited by *Executive Jet* v. *City of Cleveland,* 409 U.S. 249 (1972), wherein the Court held,

> There has existed over the years a judicial legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the

purposes of maritime law then is a purely mechanical application of the locality test. *Id.* at 261.

The proper test, instead, is whether the wrong bears a "significant relationship to traditional maritime activity." *Id.* at 268. There can be no activity with a more "significant relationship to traditional maritime activity," than the sinking of a vessel at sea. The sinking of a vessel must of necessity, occur on navigable waters and, is thus, a maritime event. Since the sinking of the LADY MARGARET occurred on the high seas, the precepts of DOHSA apply and preclude any award for loss of society. *Higginbotham,* at 622-26.

The close similarity between the facts of the case at bar and the facts of *Higginbotham,* wherein the Supreme Court set forth the rule that claims for loss of society cannot be entertained under DOHSA, unambiguously demonstrates that the sinking of the LADY MARGARET was a traditional maritime activity controlled by DOHSA. *Higginbotham,* arose out of the disappearance—almost without a trace—of a helicopter flying over the Gulf of Mexico. *Higginbotham,* 436 U.S. 618. As in the case at bar, (212) the trial Court's finding of negligence in *Higginbotham* was based in part on the negligence in purchase, overhaul, maintenance, selection and supervision of personnel and operation. *Higginbotham,* 545 F.2d at 431; *Higginbotham,* 275 F.Supp. 1164, 1173, 1174 (W.D. La. 1973). Many of these actions occurred on land. *Higginbotham,* 545 F.2d at 431; *Higginbotham,* 357 F. Supp. at 1173, 1174. In the case at bar, petitioners now contend that such land based activity was sufficient to remove their cause from the ambit of DOHSA and allow a recovery for loss of society under General Maritime Law. (Brief for Plaintiff at 8, 9). Plaintiff's argument is flatly

refuted by the result in *Higginbotham,* 436 U.S. 618, where the Supreme Court in limiting *Sea-Land Service, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), stated that there can be no recovery for loss of society under DOHSA. *Higginbotham,* 436 U.S. at 622-26.

Petitioners' argument, if carried to its logical conclusion, would emasculate DOHSA. Maritime cases often involve some degree of land-based activity. *See, e.g., Higginbotham,* 436 U.S. 618. To hold that this taint is sufficient to remove the case at bar from the ambit of DOHSA would be contrary to the clear intent of the Congress when it enacted DOHSA. The intent was to provide an equitable remedy of broad and uniform application for death on the high seas. *Higginbotham,* 436 U.S. at 624. Plaintiff's reliance on *Hartsfield* v. *Seafarers International Union,* 427 F.Supp. 264 (D.C.S.D. Ala. 1977) for the proposition that the award for loss of society should be reinstated, is grieviously misplaced. Respondent has no quarrel with the dictum in *Hartsfield,* 427 F.Supp. at 268, 269, cited by plaintiff wherein the Court simply stated that, for DOHSA to apply, a wrong must have occurred on the high seas (P.Br. at 11). In the case at bar, the alleged wrong to which maritime jurisdiction attached, the sinking of the LADY MARGARET occurred on the high seas. This is in contrast to *Hartsfield,* where the alleged wrong occurred in a union hiring hall and the Court rejected maritime jurisdiction. *Hartsfield,* 427 F.Supp. at 269, 270. *Hartsfield* says nothing about awarding damages for loss of society when sinking and drowning occur on the high seas.

Plaintiff's reliance on *Smith* v. *Ithaca Corp.,* 612 F.2nd 215 (5th Cir. 1980), is as misplaced as his reliance on *Hartsfield.* The *Smith* Court awarded damages for loss of society to a seaman who died after inhaling benzene

on the high seas and in territorial waters. *Smith,* 612 F.2d at 226. Thus there was a completed tort in territorial waters. *Higginbotham* makes it clear that there can be no award for loss of society for injury precipitating wrongful death when that injury occurs on the high seas and is therefore controlled by DOHSA. In the case at bar, in contrast to *Smith,* the injury that allegedly precipitated the wrongful death of Thomas Morgan—his drowning—occurred solely on the high seas. Therefore, there can be no award for loss of society.

B. The benefit of maintaining uniform maritime law compels the Court to reject petitioners' appeal to state law.

In this case, negligence was alleged to have occurred in any number of states. The vessel was purchased in Maryland; refurbished in Florida and Michigan; plaintiff, Dorothy Morgan had discussions with Captain Stephenson in New York State; plaintiffs were domiciled in New York State; plaintiffs boarded the vessel in Virginia; the decision to set out to sea at a particular time was made in North Carolina, and presumably, although not in the record, the overall route may have been selected in any state between Michigan and North Carolina.

As stated above, the purpose of federal maritime law is to provide a uniform system of law and to relieve the Courts of the duty of borrowing, here and there, from such local law as might seem favorable at the moment to one party. Petitioners do not suggest that respondent can search the common and statutory law of five states to develop the most appealing constellation of rules of decision. Since *Moragne* v. *States Marine*

Lines, Inc., 398 U.S. 375 (1970); *Gaudet* and *Higginbotham, supra,* there is no reason to grant such a privilege to petitioners.

C. Since DOHSA applies to the case at bar, there can be no award for loss of society.

As petitioners' brief concedes, (Brief for Plaintiff, at 9, 10) and as the Supreme Court has held in *Higginbotham,* 436 U.S. at 622-26, there can be no award for loss of society in cases controlled by DOHSA. As demonstrated, above, DOHSA is controlling in the case at bar. Therefore any claims for loss of society are untenable.

III

The decision of the Court below which affirmed the setting aside of the jury's award to Mrs. Morgan for her mental pain due to her presence during the drowning of her son represents the appropriate disposition of the instant matter.

A. The Death on the High Seas Act dictates that recovery for wrongful death shall be limited to pecuniary loss.

As stated by the Supreme Court in *Higginbotham*:

> Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements.

Clearly the damage to Mrs. Morgan was not pecuniary in nature and is barred under DOHSA. However, petitioners contend that the law of New York would allow such a recovery and cites *Shanahan* v. *Orenstein,* 52 A.D.

2d 164 (1st Dep't.), 383 N.Y.S.2d 327, as a basis for the awarding of such damages. Assuming, arguendo, that the law of New York, or for that matter the law of Michigan, has any bearing whatsoever upon the issue before this Court, the law of New York State is quite contrary to petitioners' pronouncement. *Tobin* v. *Grossman,* 24 N.Y.2d 554, 249 N.E.2d 419 (1969), is the definitive statement in New York State on the issue and bars recovery of a claim based on plaintiff's witnessing an occurrence that resulted in the deaths of family members. The *Shanahan* decision concerned a woman who received physical injuries while attempting to rescue her son and mother from collapse of a parapet wall which rained hundreds of bricks upon them as well as the plaintiff. The Court remanded the matter for new trial on the issue of the mother's consequential damages.

As stated by the Appellate Division, First Department of New York State in *Shanahan* at 239:

> study of the rationale set forth in *Tobin* v. *Grossman, supra,* impels the conclusion that plaintiff Maryann McLaughlin may not recover merely because she was an eyewitness to the occurrence resulting in the deaths of her infant son and mother.

In the case at bar, Mrs. Morgan never saw her son drown, but last saw him when the crew and guests were about to abandon the ship. It is not known when or where Thomas Morgan died and it must be conceded that Mrs. Morgan was not knowingly present at, nor did she witness, his death. An expansion of the "zone of danger" concept to the extent of including a major portion of the Atlantic Ocean which was being confronted by heavy seas, etc., would clearly be an extension well beyond the

Shanahan decision. Again, this presumes that the law of New York is applicable which, clearly it is not.

The only federal maritime law case cited by plaintiffs' counsel is from the United States District Court for the Southern District of Georgia, Savannah Division, *Complaint of Farrell Lines Inc.,* 389 F.Supp. 194 (S.D. Ga. 1975). This non-DOHSA wrongful death action, which predates *Higginbotham,* is based on *Moragne* and cannot truly be applicable to the case at bar. Nonetheless, we respectfully submit that the case clearly is distinguishable on the facts in that the plaintiff actually witnessed the deaths of three of her family members as opposed to the case at bar where no such situation occurred.

IV

An award of pre-judgment interest was not appropriate in this case.

A. Pre-judgment interest awards are governed by federal maritime law.

Contrary to the contention of the petitioners, neither the law of New York nor the law of Michigan applies. Rather, as discussed above, the maritime law of the United States, constitutionally and decisionally, preempts state law. *Pope and Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953); *Garrett* v. *Moore McCormack Line, Inc.,* 317 U.S. 239 (1942); *Riley* v. *Agwilines, Inc.,* 296 N.Y. 402, 73 N.E. 2nd 718 (1947); cf. 1 Benedict, § 105 at 7-10 to 7-16. As to the aplicability and preemption of federal maritime law in matters of pre-judgment interest see, *Moore-McCormack Lines* v. *Amirault,* 202 F.2d 893 (1st Cir. 1953); *Robinson* v. *Pocahontas, Inc.,* 477 F.2nd 1048 (1st Cir. 1973); *Newburgh Land and Dock Co.* v. *The Texas Co.,* 227 F.2d 732 (2nd Cir. 1955).

B. Assuming, arguendo, state law applied, an award for pre-judgment interest would not lie.

Even if the law, of the domicile (New York) was applicable, we submit that the law of New York State does not allow the recovery of pre-judgment interest pursuant to its statutes when an action is governed by the law of another jurisdiction. *Davenport* v. *Webb,* 11 N.Y.2d 392, 183 N.E. 2d 902, 230 N.Y.S. 2d 17 (1962); *Kiefer* v. *Grand Trunk Ry.,* 12 App.Div. 28, 42 N.Y.S. 171 (4th Dep't 1896) aff'd 153 N.Y. 688, 48 N.E. 1105 (1897).

More specifically, the Courts of the State of New York have ruled that pre-judgment interest may not be awarded pursuant to New York law in an action brought under DOHSA. *Wyman* v. *Pan American Airways, Inc.,* 181 Misc. 963, 43 N.Y.S. 2d 420 (Sup.Ct. 1943), aff'd 267 App. Div. 947, 48 N.Y.S. 2d 459 (1st Dep't), aff'd 293 N.Y. 878, 59 N.E. 2d 785 (1944); see, Weinstein, Korn, Miller, N.Y. Civil Practice Vol. 5, at 50-34 to 40-35, par. 5001.13.

C. Applicable federal law does not require the awarding of interest in the instant action.

An admiralty court has discretion in fixing pre-judgment interest. *Stuart M. Speiser, Recovery for Wrongful Death,* 2d Ed. (1975) and cases collected at 720-21. The Court's attention is invited to *Robinson* v. *Pocahontas, Inc., supra.* In *Robinson,* a diversity case, wherein a claim under the Jones Act and one for unseaworthiness under the general maritime law were joined, the jury returned a verdict in favor of the plaintiff, to which the trial court added pre-judgment interest. The Circuit Court indicated that notwithstanding the diversity aspect, federal maritime law must apply, and a state pre-judgment interest statute could not. In vacating the award, the court

opined that the trial court abused its discretion, in that the interest award violated the province of the jury, citing *Newburg Land and Dock Company, supra.* There, pre-judgment interest was at issue in a jury-tried action for property damage, and the Court had not been requested to instruct the jury on the addition of interest. The Court in *Newburg* concluded, at 735:

> had the dispute arisen in an admiralty suit, it would have been possible to remand the decree so that the judge might exercise his discretion; but that is not so here, if it is the jury who have the discretion, because the plaintiff at no time asked that the question should be left to them. It is the federal law that in actions at law when the award of interest rests in discretion, it is the jury who must exercise it, (footnote omitted) and it follows that we may not remand the case to the judge, but that we must modify the judgment by striking out the award of interest, and direct judgment to be entered for the amount of the verdict only.

In the instant case, petitioners neither requested nor was the jury instructed as to an award for pre-judgment interest.

Barton v. *Zapata Offshore Co.*, 397 F.Supp. 778 (E.D. La. 1975) is also instructive. There, plaintiff joined Jones Act and unseaworthiness claims for personal injuries. The jury found the defendant liable on both counts. While initially the jury was instructed on the issue of pre-judgment interest, this was later withdrawn and submitted to the Court. In denying the award of pre-judgment interest, the Court stated at 780:

> . . . the verdict found the employer liable under the Jones Act as well as the General Maritime Law; the elements and amounts of damage claimed were

> identical. If the court may not award pre-judgment interest on the Jones Act claim, there is no separate 'pure' admiralty item (the unseaworthiness issue) on which to allow interest. Furthermore, the reason given by the court in *Moore-McCormack Lines, Inc.* v. *Richardson* . . . for denying a right to pre-judgment interest in the jury-tried Jones Act cases—that the jury considers the delay in making an award—would apply with equal force to a jury-tried unseaworthiness claim. *In sum the plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails.* (emphasis added)

It is submitted that the logic of *Barton* applies with equal force to the case at bar.

D. There was no abuse of discretion in the denial of pre-judgment interest inasmuch as there was no factual basis for awarding it.

Assuming, arguendo, that the trial judge, as opposed to the triers of fact, had the ability to make a determination as to the propriety of an award of pre-judgment interest, then there was no abuse of discretion in refusing to award such interest. As Judge Weinstein stated:

> There are here, too, the very special circumstances that the deceased would have made no substantial contribution, even giving the facts the most favorable view from the plaintiff's point of analysis, for some years. The family would have had to have made a net expenditure in the immediate future, so it's unrealistic to believe that income for the

> family was cut off as of the date of the death. I'm sure counsel will understand that I don't mean to be cruel and harsh but the economic fact is that the immediate effect of the death was to save the family an outlay of cash. . . . (239-240)

The Fifth Circuit case *National Airlines, Inc.* v. *Stiles*, 268 F. 2d 400 (5th Cir. 1959) cited by plaintiff in his brief is clearly distinguishable to the case at bar. The facts in that suit relate to the death of an individual who left a wife and children without other means of support. As the Court stated:

> It is quite obvious that a party suffering a financial loss from the death of a bread winner, just as from the destruction of a ship, can be placed in the same position as he previously enjoyed only if the award is made at the time of the loss of if interest for the time between loss and payment is allowed. (*Id.* at 405)

Here there is no question but that Thomas Morgan was not a "bread winner".

In the other case cited by plaintiff, *First National Bank of Chicago* v. *Material Services Corp.*, 597 F. 2d 1110 (7th Cir. 1979), an admiralty action tried without jury, the court remanded the question of pre-judgment interest to the district court to review various factors that were to be weighed by the trier of the facts before a determination as to pre-judgment interest could be made. None of the factors present in that matter are applicable to the case at bar (five year delay in obtaining award, laches on the part of plaintiff, mutuality of fault regarding the delay, etc.). Clearly the court in *Material Service* was able to refer the issue back to the trier of the facts while, in the case at bar, the jury panel has been dismissed.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

WILLIAM G. KRAL
COSTELLO & SHEA

AND

JACK WEINBERGER
STANDARD, WEISBERG, HECKERLING & ROSOW

Attorneys for Respondent

[APPENDICES FOLLOW]

APPENDIX A

Consent to Reduce Verdict

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 Civil No. 602

Judge Weinstein

DOROTHY J. MORGAN, Individually and GEORGE J. MORGAN and DOROTHY J. MORGAN, as Administrators of the Estate of THOMAS EDWIN MORGAN, Deceased,

Plaintiffs,

—against—

GLOBAL COMMUNICATIONS, INC.,

Defendant.

We, DOROTHY J. MORGAN and GEORGE J. MORGAN, plaintiffs in the above entitled action hereby consent that the verdict in the sum of $200,000.00 for pecuniary loss rendered herein in our favor and against the defendant Global Communications, Inc., be reduced to the sum of $100,000.00.

Dated:

DOROTHY J. MORGAN
Dorothy J. Morgan

GEORGE J. MORGAN
George J. Morgan

Appendix A

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On the 22nd day of November, 1980, before me personally came DOROTHY J. MORGAN and GEORGE J. MORGAN, to me known and known to me to be the individuals described herein and who executed the within Consent.

JOHN H. REILLY, JR.
Notary Public

John H. Reilly, Jr.
Notary Public, State of New York
No. 31-8533085
Qualified in New York County
Commission Expires March 30, 1982

APPENDIX B

Consent to Reduce Verdict

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

78 Civil No. 602

Judge Weinstein

DOROTHY J. MORGAN, Individually and GEORGE J. MORGAN and DOROTHY J. MORGAN, as Administrators of the Estate of THOMAS EDWIN MORGAN, Deceased,

Plaintiffs,

—against—

GLOBAL COMMUNICATIONS, INC.,

Defendant.

I, DOROTHY J. MORGAN, a plaintiff in the above entitled action hereby consent that the verdict in the sum of $250,000.00 rendered herein in my favor and against the defendant Global Commuincations, Inc., be reduced to the sum of $150,000.00.

Dated:

DOROTHY J. MORGAN
Dorothy J. Morgan

Appendix B

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On the 22nd day of November, 1980, before me personally came DOROTHY J. MORGAN, to me known and known to me to be the individual described herein and who executed the within Consent.

JOHN H. REILLY, JR.
Notary Public

John H. Reilly, Jr.
Notary Public, State of New York
No. 31-8533085
Qualified in New York County
Commission Expires March 30, 1982